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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1398

ROBERT LEICHMAN, JR.,

Petitioner

versus

STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF LOUISIANA

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TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above entitled case December 3, 1973, rehearing denied December 19, 1973.

CITATION TO OPINION BELOW

The judgment of the Supreme Court of Louisiana is reported at 286 So.2d 649 (1973). It is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered December 3, 1973, and

motion for rehearing was denied December 19, 1973. The mandate and decree of the Louisiana Supreme Court was stayed until March 18, 1974 by it. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3), petitioner having asserted below and is asserting here to deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. The grand jury which indicted petitioner and the grand jury venire and general venire from which it was chosen and the petit jury which convicted petitioner and the petit jury venire and general venire from which it was drawn were chosen from lists from which female citizens were systematically excluded.

Under these circumstances was petitioner denied equal protection and due process of law by being indicted by a grand jury and convicted by a petit jury from which women were systematically excluded?[1]

2. Petitioner, through his counsel, filed a motion for change of venue from the small rural parish in which petitioner was tried on the ground that due to the widespread publicity given the charges against him he could not receive a fair and impartial trial in Union Parish, Louisiana.

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[1] This Court recently has consideration under appeal the three-judge court decision invalidating such a procedure, Healy v. Edwards, No. 73-688, U.S.D.C. E.C. La. Aug. 31, 1973.

Under the facts as outlined hereinafter, was petitioner denied a fair and impartial trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and established by this Court in Rideau v. State of Louisiana, 373 U.S. 723 (1963)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

This case involves Article 402 of the Louisiana Code of Criminal Procedure and Article VII, Section 41 of the Constitution of the State of Louisiana, said Louisiana authority is set out in Appendix B. infra.

STATEMENT

The defendant was indicted by grand jury, tried by jury, convicted and sentenced to life imprisonment without benefit of parole, probation, or commutation of sentence. His conviction was subsequently upheld by the Supreme Court of Louisiana in a decision reported at 286 So.2d 649 (1973) (Appendix A, infra.).

A. FACTS RELATING TO THE EXCLUSION OF WOMEN FROM THE JURY ROLES

Prior to trial petitioner filed motions to quash the indictment filed against him on the ground that women were systematically excluded from jury service. The evidence reveals that women were excluded from jury service by law unless they volunteer to serve under Louisiana Code of Criminal Procedure Article 402 and Louisiana Constitution

Article VII, Section 41. The testimony showed that only two women of a total of 400 persons were on the general grand jury venire (Bill No. 3, Tr. p. 15),[2] and no women were on the general petit jury venire, petit jury venire and the grand jury venire (Bill No. 3, Tr. p. 16,17). According to the 1970 census introduced into evidence, 52% of the population of Union Parish, Louisiana, is female (see attachment to Bill No. 2 and Appendix C).

B. FACTS RELATING TO DENIAL OF A FAIR AND IMPARTIAL TRIAL IN THE VENIRE OF UNION PARISH, LOUISIANA BECAUSE OF PREJUDICIAL PRETRIAL PUBLICITY

The circumstances of the prejudicial pretrial publicity in the instant case are as follows: Union Parish is a small, sparsely populated rural area served primarily by two parish newspapers with a combined circulation of 3,500 (Bill No. 4, Tr. P. 2). During April and May of 1973 (the trial commenced in June) these papers carried a number of stories on the illlings of the marshals that can only be characterized as spectatular and inflamatory. (See defendant's exhibits 1 through 6, copies of newspaper articles, Bill No. 4). When the defendant was arrested, a crowd of

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[2] Record citations are to the Bill of Exception number and transcript attached thereto of the record of the Supreme Court of Louisiana. Pursuant to Rule 21 the record may not be filed in this Court at the time of filing this petition. However, the clerk of the Supreme Court of Louisiana has been requested to certify the record and transmit it to this Court.

75 to 100 gathered outside of the Union Parish Jail and threatened to kill the defendant (Bill No. 4, Tr.P. 32, 59, 68; 39, 41, 46, 47) whereupon defendant was taken to a jail in another parish for his own protection (Bill No. 4, Tr.p. 37,62). Law officers testified that people were "riled up" (Bill No. 4, Tr.p.39), "some of them wanting to kill him" (Bill No. 4, Tr. p. 39) and some were armed later that night (Bill No. 4, Tr. p. 32). Further, the jurors and potential jurors revealed on voir dire that they were quite familiar with the publicity. The defense challenged a number of these jurors for cause on the basis that they were familiar with the unfavorable publicity, had an opinion as to the guilt or innocence of the defendant, and that this prejudgment could not be overcome by instructions of the Court relative to defendant's presumption of innocence. Typically these prospective jurors testified that they were familiar with the newspaper accounts, had formed a definite opinion as to the guilt or innocence of the defendant, generally indicated that this opinion would stay with them at least in the backs of their minds, and some even testified that they did not presume the defendant to be innocent. However, generally when leading questions were put to them by the prosecutor relative to their ability to disregard their prior opinions, they would testify when pressed that their opinions were not totally fixed. For the specific testimony on voir dire of these prospective jurors, see Bill No. 5, Tr. p. 6, 8; Bill No. 6, Tr. p. 2, 3, 4; Bill No. 7, Tr. p. 1,2, 4; Bill No. 9, Tr. 1, 3; Bill No. 10, Tr. p. 1, 3,4. All of these potential jurors were challenged for cause, which was overruled by the Court. The defendant exhausted all of his peremptory challenges (Bill No. 10, Tr. p. 8). Thus,

under the circumstances of this case, all of the factors are present which would require a change of venue in order to obtain a fair trial.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Prior to trial, petitioner filed motions to quash the indictment challenging the method by which grand juries, petit juries, and their respective venires were selected. He raised in those motions the constitutionality, under the Fourteenth Amendment to the United States Constitution, of excluding female citizens from jury service (Bills 2 and 3).

Upon his appeal this federal constitutional question was raised by petitioner in his enumeration of errors to the Supreme Court of Louisiana.

Prior to trial, petitioner filed a motion to change the venire from Union Parish, Louisiana, because of the widespread pre-trial publicity concerning his case. He based these motions upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (Bill 4).

Upon his appeal this constitutional question was raised by petitioner in his enumeration of errors to the Supreme Court of Louisiana.

The Supreme Court of Louisiana held the trial court did not abuse its discretion in denying the aforesaid motions.

REASON FOR GRANTING THE WRIT

I

THE DECISION UPHOLDING THE EXCLUSION FROM JURIES OF CITIZENS WHO ARE FEMALES DEPRIVE THE DEFENDANT OF THE IMPARTIAL JURY REQUIRED BY "DUE PROCESS AND EQUAL PROTECTION OF THE LAWS" GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court of Louisiana held that it is well settled that the fact that women do not appear on a general venire list for jury duty furnishes no cause for quashing an indictment in view of Article 402 of the Code of Criminal Procedure.[3] Petitioner contends that this holding raises an important constitutional issue and should be reviewed by this Court to determine the extent of his rights under the Fourteenth Amendment to a jury venire representing a true cross-section of the community involved.

The Supreme Court of Louisiana relied on the decision of this Court in Hoyt v. Florida, 368 U.S. 57 (1961), in holding that its statutory scheme was valid. Petitioner urges that Hoyt is distinguishable from the present case or, in the alternative, that this court should grant certiorari to reconsider Hoyt in light of more recent cases such as Carter v. Jury Commission of Greene County, 396 U.S. 320. (1970). Also that defendant is a male does not deprive him of standing to challenge the exclusion of women, Peters v. Keft, 407 U.S. 493 (1972).

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[3] See Article 402 of Louisiana Code of Criminal Procedure set out in full in Appendix B.

In Hoyt, the record revealed that the list of names from which the venire was chosen did contain the names of women who had registered for jury service and that the number so included was proportionately at least a fair representation of the total number of eligible women registered for jury service. Thus, there was not a total exclusion of women from jury duty by the operation and administration of the Florida jury statutes.

In this case, it was admitted that virtually no women had served on any juries at all. The 1970 census of Union Parish indicates that females comprise approximately 52% of the population. Thus, there is no question but that a significant portion of the population was effectively excluded from jury service and that no jury could represent a true cross-section of the community involved as this Court stated was necessary in Smith v. Texas, 311 U.S. 128 (1940).

It is urged that this Court's decision in Carter v. Jury Commission is inconsistent with such a result. There, the importance of juries reasonably representing a cross-section of the community was stressed, 396 U.S. at 330. Whatever may be the continuing validity of the statutory scheme upheld in Hoyt, i.e., of requiring women to volunteer before they may be considered for jury duty, the administration of such a scheme as shown here is surely open to question. Clearly, petitioner has shown the existence of a deliberate policy of making no effort to obtain women for jury duty. The result has been a complete absence of women from jury service.

Thus, this issue is appropriate for the granting of certiorari and the judgment below should be reversed.

II

THE DECISION OF THE SUPREME COURT OF LOUISIANA DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL BY JURY AS REQUIRED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Courts have identified a number of factors to be considered in determining the propriety of a change of venue on account of prejudicial pretrial publicity. Generally stated, those factors are: the nature of the publicity; the size of the area from which the venire is drawn; the time elapsed between the publicity and the trial; the ease or difficulty in selecting the jury; the familiarity of the jurors and potential jurors with the publicity; whether the defendant exhausted his peremptory challenges; and whether he made challenges for cause; the severity of the offense; and whether there were threats against the defendant. Rideau v. State of Louisiana, 373 U.S. 723 (1963). Considering the facts and circumstances heretofore outlined, it is most difficult to imagine a more appropriate case for change of venue. Under the circumstances of this case, all of the factors are present which would require a change of venue in order to obtain a fair trial. These circumstances seem to be directly in point with those in Rideau v. Louisiana, supra, where this Court found that the defendant was denied a fair trial due to pretrial publicity. In Rideau, as in the case at bar, the jurors had testified that notwithstanding what they had known of the case from pretrial publicity, they could lay aside any opinion and give the defendant a fair trial. Also, defendant's peremptory challenges had been exhausted, and challenges for cause on this basis had been denied. This case appears indistinguishable from Rideau, and under federal

constitutional law, certiorari should be granted to decide if petitioner was denied a fair and impartial trial. Petitioner suggests that the Court follow the sound logic and discretion exercised by a California appellate court in People v. McKay, (1951), 37 Cal. 2d 792, 236 P.2d 145. McKay involved strikingly similar facts in that there the victims were also well-known popular officers of a small county and the Court held that a change of venue was necessary to assure defendant a fair trial.

CONCLUSION

For the foregoing reasons, petitioner prays a writ of certiorari be granted and his conviction reversed.

RESPECTFULLY SUBMITTED,

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ATTORNEYS AT LAW
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MONROE, LOUISIANA 71201

BY: _____
STEPHEN J. KATZ

DATED: MARCH 15, 1974

CERTIFICATE

I hereby certify that I have this 15th day of March, 1974, served a copy of the above and foregoing upon Honorable Ragan Madden, District Attorney, Third Judicial District, Parish of Union, Ruston, Louisiana, and Honorable William Guste, Attorney General, State of Louisiana, Post Office Box 44005, Baton Rouge, Louisiana, by placing same in the U.S. Mail, postage prepaid, addressed to each respective office.

STEPHEN J. KATZ

APPENDIX

defense of all police investigatory work on a case."

[8] To hold that the statements here had to be delivered to the defendant before trial would require, as a matter of constitutional right, full unilateral pre-trial discovery in favor of the defendant of the State's investigative files. We are unable to construe the Due Process Clause so broadly. See State v. Bailey, 261 La. 831, 261 So.2d 583 (1972); State v. Gladden, 260 La. 735, 257 So.2d 388 (1972).[3]

We conclude that Bill of Exceptions No. 3 is without merit.

For the reasons assigned, the conviction and sentence are affirmed.

BARHAM and DIXON, JJ., concur.

STATE of Louisiana, Appellee,

v.

Robert LEICHMAN, Jr., Appellant.

No. 53052.

Supreme Court of Louisiana.

Dec. 3, 1973.

Murder prosecution. The Third Judicial District Court, Parish of Union, Fred W. Jones, J., rendered judgment and defendant appealed. The Supreme Court, Tate, J., held that denial for change of venue was not error, that evidence did not establish systematic exclusion of blacks from jury, and that rejection of challenges to jurors was not error.

Affirmed.

Barham, J., dissented and filed opinion.

1. Criminal Law ⇐134(1)

Defendant has burden of proving that he cannot obtain a fair trial in parish where prosecution is pending. LSA-C.Cr. P. art. 622.

2. Criminal Law ⇐126(1)

Change of venue requires showing of more than mere knowledge by public of facts surrounding offense and requires in addition proof of such prejudice in public mind that fair and impartial trial cannot be obtained in the parish. LSA-C.Cr.P. art. 622.

3. Criminal Law ⇐126(2)

Under evidence, denial of motion for change of venue on ground of inability to obtain fair and impartial trial by reason of prejudice in parish was not error, despite evidence of activity and expressions of violent intention toward defendant on night of murder, two months before trial. LSA-C.Cr.P. art. 622.

4. Constitutional Law ⇐224, 267

Due process and equal protection guarantees are not offended by exemption of women from jury service. LSA-Const. art. 7, § 41; LSA-C.Cr.P. art. 402.

5. Jury ⇐33(4)

Selection of jurors from voter registration rolls, which contained greater proportion of whites than of blacks, did not constitute systematic exclusion of blacks in absence of evidence that registration rolls reflected greater proportion of whites than of blacks eligible for jury service.

3. The Court's recent decision in State v. Woodruff, La., 281 So.2d 95 (1973) is not relied upon by the defendant. Nonetheless, we note that its factual and procedural context clearly distinguish it from the present case.

6. Jury ⇐120

Evidence disproved any purposeful discrimination against blacks in jury selection process involving selection from voter registration rolls, even if disproportion between blacks and whites on venire was so great as to constitute prima facie case of purposeful discrimination.

7. Jury ⇐97(4), 103(2)

Rejection of challenges for cause of jurors who initially indicated reservations as to presumption of innocence, lack of understanding of some questions, or friendship with victim was not error where on further interrogation judge was satisfied that jurors would accept instructions and render impartial verdict. LSA-C.Cr.P. art. 797(2-4).

8. Criminal Law ⇐365(1)

Evidence as to killing of second deputy was part of res gestae and admissible, its relevance outweighing its prejudicial effect, in prosecution for killing first deputy in same incident. LSA-R.S. 15:447, 15:448.

Paul Henry Kidd, Stephen J. Katz, Stanley A. Halpin, Jr., Kidd, Katz & Halpin, Monroe, for appellant.

William J. Guste, Jr., Atty. Gen., LeRoy A. Hartley, Sp. Counsel to Atty. Gen., Ragan D. Madden, Dist. Atty., James T. Spencer, First Asst. Dist. Atty., for appellee.

TATE, Justice.

The defendant Leichman was convicted of murder. La.R.S. 14:30. The verdict of guilty was qualified to provide for life imprisonment without benefit of parole, probation, commutation, or suspension of sentence. La.C.Cr.P. art. 817 (1972). The defendant appeals.

The most serious issues raised by the eighteen bills of exceptions relate to: (1) the trial court's denial of a motion for a change of venue (Bill No. 4); and (2) the trial court's denial of a motion to quash the indictment on the grounds that blacks and women were systematically excluded from the jury venires and the grand jury (Bills Nos. 2 and 3).

1. *Change of Venue*

The defendant Leichman, a black man, killed two night deputies, one white and one black, who had gone out to his home to quell a disturbance between him and his wife. By the present proceeding, Leichman was tried for and convicted of the murder of one of them, Deputy Neal.

The defendant moved for a change of venue on the ground that he could not obtain a fair and impartial trial by reason of prejudice agaist him in the minds of the residents of Union Parish, where the crime was committed. La.C.Cr.P. art. 622.[1] As explained by the official revision comment to this article, the intent of the statutory provision for a change of venue is as follows:

"A change of venue ought to be available even though, individually, each juror is not susceptible to a valid challenge for cause, if the defendant can show that overriding all of these things and superimposed upon all of them he still cannot get a fair trial. The change of venue concept should operate where the state of the public mind against the defendant is such that jurors

1. Article 622 provides:
"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

"In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial."

will not completely answer honestly upon their voir dire, or witnesses will be so affected by the public atmosphere that they will not testify freely and frankly."

[1, 2] The defendant bears the burden of proving that he cannot obtain a fair trial in the parish where the prosecution is pending. State v. Richmond, 284 So.2d 317 (La.Sup.Ct., September 24, 1973, Docket No. 53,407) and decisions there cited. As there noted, the Article requires a showing of more than mere knowledge by the public of the facts surrounding the offense. It requires, in addition, proof of such prejudice in the public mind that a fair and impartial trial cannot be obtained in the parish.

[3] We cannot say, on our review of the evidence in support of a change of venue, that the trial court erred in denying the motion.

The motion for a change of venue was heard on June 4, 1973, immediately prior to the trial on the merits which commenced June 6th. Of the six witnesses called by the defendant, five of them testified that the defendant could receive a fair trial in Union Parish; only one, the defendant's daughter, testified to the contrary.

The most impressive reason for assuming public prejudice is based on activities of April 8, 1973, the night of the murder and of the defendant's arrest therefor, two months before the trial. During the nearly three hours of the search for Leichman after the killings, a crowd of 50–100 people had gathered at the parish court house. The crowd consisted of both black and white people. They were talking and milling around, and a few of them were indicating violent intentions toward the defendant. After the defendant was arrested, therefore, he was brought to the parish jail of the adjoining parish, for his safekeeping and to avoid any incident.

However, the evidence indicates that, following that evening, there was no general excitement about the issue. The defendant was returned to the Union Parish jail two weeks or so later and was maintained there until the trial, without further incident.

There was no unusual or sensational publicity about the shootings. The two parish newspapers, with a total press run of about 3,500 in a parish of 18,000 population, carried only three factual stories about the incident prior to the trial of June 6th.[2] No complaint is made that the coverage of the Monroe daily newspapers and television station serving Union Parish was sensational or other that routinely factual following the incident.

We therefore find no merit to the bill taken to the denial of the motion for a change of venue.

2. *Composition of the Jury Venires and of the Grand Jury*

Two motions to quash the indictment were based upon the contention that women and blacks were systematically excluded from the jury venires and the grand jury.

[4] As to the former, a majority of this court has consistently rejected the contention that due process or equal protection guarantees are offended by the Louisiana provisions that women are exempted from jury service unless they volunteer for it (La.Const. art. 7, Section 41; La.C.Cr.P. art. 402). State v. Davis, 278 So.2d 130 (La.Sup.Ct., October 29, 1973, Docket No. 53,070).

[5] As to the latter contention—that blacks are systematically excluded from jury service in Union Parish—, the chief contention is that, since there is a greater proportion of whites registered to vote than of blacks of the total population, the

2. They were: a full factual account on April 12th, the first issue of the weeklies after the shooting; a two-paragraph account of the indictment on April 19th; and a passing one-paragraph reference to a sanity hearing in a story mainly devoted to bootlegging convictions on May 17th.

method of selection from the voter-registration rolls automatically insures a disproportionate diminution of blacks chosen for the venires. There is no evidence, however, that the voter-registration rolls reflects a greater proportion of white than of black *adults eligible for jury service;* in fact, the median age of the white population is appreciably higher than that of the black. Nor does the evidence reflect the proportions of men and women on the registration rolls.

[6] Further, the evidence disproves any purposeful discrimination.

The evidence shows: Of the 18,447 parish population, 34% is black. Of the 10,863 registered voters, 24% are black. Of the 400 selected for the general venire from which the grand jury was chosen, 16% were black. Of the 400 selected for the general venire from which the petit jury was chosen, 18% were black. Of the grant jury venire of 30, three (or 10%) were black, one of whom was drawn to serve on the grand jury. The petit jury venire of 75 included 11 blacks, or 14.66%. Nowhere in the jury commission records was any attempt made to record the race of the prospective veniremen and jurors.

We doubt that the disproportion between blacks and whites is so great as to constitute a prima facie of purposeful discrimination under Whitus v. State of Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967), especially since no race was indicated as to the registered voters from whom the veniremen were selected by chance. If, however, such a prima facie case could be assumed to have been established, the evidence convincingly disproves that in fact such purposeful discrimination occurred.

The five jury commissioners, one of whom was black, testified that the jury venires were chosen as follows: Slips of names of all of the registered voters were placed in a box. The slips were then chosen at random from the box. In making up the venire of 400, the commissioners eliminated (1) women (unless they had indicated a willingness to serve, La.C.Cr.P. art. 402), (2) known illiterates, ineligible to serve, (3) those with criminal records, ineligible to serve, (4) those deceased or no longer residents of the parish, and (5) those with birthdates in the 1880's and 1890's, as (on the basis of past experience) too old to agree to serve.[3]

The jury commissioners all testified that no person was eliminated because of race. They testified uniformly that random procedures were used to choose from the registered voters those to serve on the venire, with an attempt to eliminate only those ineligible or unable to serve as jurors. Choosing of the grand jury venire and of the grand and petit juries was also at random and without regard to race. The evidence convincingly establishes color-blind procedures for and selection of veniremen and jurors.

As we recently stated in State v. Jack, 285 So.2d 204, 206 (La.Sup.Ct., October 29, 1973), in rejecting similar contentions under similar circumstances:

"• • • Thus, there exists no showing of purposeful discrimination in the selection of the jury venire. The circumstance that the general venire was selected from the voter registration rolls does not, of itself, constitute a deprivation of constitutional rights. State v. Douglas, 256 La. 186, 235 So.2d 563, cert. denied, 401 U.S. 914, 91 S.Ct. 888, 27 L.Ed.2d 814 (1970); State v. Poland, 255 La. 746, 232 So.2d 499, penalty vacated and remanded, 408 U.S. 936, 92 S.Ct. 2862, 33 L.Ed.2d 754 (1970).

"Moreover, no requirement exists that there be proportionate representation on

3. Any name completely unknown to any of the five commissioners, who included the clerk of court and members drawn from all over the parish, was also eliminated, although only about 25–30 were so eliminated in the choosing of each venire.

the jury venire. Rather, the procedures must be reasonably designed to secure a representative sampling of the community. See: Coleman v. Alabama, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed.2d 22 (1967); Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L. Ed.2d 634 (1967)."

We therefore find no merit to these bills.

3. *Other Bills*

The only other bills briefed concern (a) the failure of the trial court to sustain the trial court's challenges for cause as to certain jurors and (b) the trial court's failure to declare a mistrial when the prosecuting attorney referred in his opening statement to the killing of the second deputy in the incident and to his questioning a witness about it.

[7] As to (a), Bills Nos. 5, 6, 7, 9, and 10 were taken when the trial court rejected the defendant's challenges for cause to jurors who had initially indicated reservations as to the presumption of innocence, non-understanding of some questions, or friendship with the victim of the murder. In each instance, upon further interrogation, the trial judge was satisfied that the juror would accept the instructions of the court and render an impartial verdict in accordance with the law and the evidence. We find no error in the trial court's rejection of the challenges for cause. La.C.Cr. P. art. 797(2), (3), and (4); State v. Shaffer, 260 La. 605, 257 So.2d 121 (1971).

[8] As to (b), Bill Nos. 14, 15, and 16, the commission of the murder was an immediate concomitant of the offense with which the defendant is charged and, in conjunction with it, formed one continuous transaction; it is thus admissible as constituting part of the res gestae. Under the circumstances, its relevance outweighed its prejudicial effect. La.R.S. 15:447, 15:448; State v. Jefferson, 284 So.2d 882 (La.Sup. Ct., October 29, 1973).

We have also examined the unbriefed bills, Nos. 8, 11, 12, 13, 17, and 18, and we find no merit to them either.

Decree

For the reasons assigned, we affirm the conviction and sentence.

Affirmed.

BARHAM, J., dissents and assigns reasons.

BARHAM, Justice (dissenting).

Under Bill of Exceptions No. 4 defendant raises the issue of the trial court's denial of his motion for change of venue. While there is independent evidence in the record which would warrant the exercise of the sound discretion of the trial judge in ordering the change of venue, Bills of Exceptions Nos. 5, 6, 7, 9 and 10, reserved on voir dire examination, do, under C.Cr.P. Art. 622, lend support to the evidence in chief on the motion for change of venue. Moreover, Bills of Exceptions Nos. 5, 6, 7, 9 and 10, which were reserved when the trial court refused to challenge individual members of the jury venire for cause, present merit in and of themselves, which in my opinion require reversal.

Bill of Exceptions No. 5 was reserved when the court denied defendant's challenge for cause of Joe H. Wingfield. This prospective juror first firmly stated that if the defendant failed to testify he would question in his mind the failure of the defendant to take the stand. On cross-examination, when asked if he would take the law as given to him by the court and not hold it against the defendant if he failed to take the witness stand, the best answer that he could give was, "I'll do my best. I will try." His final answer in summation was that "It's always going to be that subconscious there, why didn't he, but I will do my best to dismiss that part of it." Additionally, when this prospective juror was asked on voir dire of his impression of a

plea of insanity as a defense to a crime, he was of the opinion that the defense of insanity would be difficult for him to accept; in fact, it would be much more difficult to arrive at a verdict of "not guilty by reason of insanity" than "not guilty". Moreover, he repeatedly said that he had a very bad opinion of psychiatrists. The district attorney and the judge tried to rehabilitate the prospective juror but the best that can be said for the rehabilitation is that both prejudices he had expressed would remain in the back of his mind during the trial and that he could only try his best to put them aside. This does not constitute a fair and impartial juror under the law. The bill of exceptions was good in my opinion.

When Mr. Ernest Booth was questioned on voir dire as a potential juror, he first stated he was a very close personal friend of the deceased victim. He then stated that he had an opinion about the defendant's guilt or innocence. Of his friendship with the deceased, he said they worked together, they went to the same church, and sat in the same pew at the church. I am of the opinion that the defendant sufficiently established a predisposition on the part of this potential juror to be entitled to challenge him for cause.

Bill of Exceptions No. 7 was reserved during the voir dire examination of Dewitt Crow. Mr. Crow stated that if two deputies were shot while they were trying to arrest someone, he would not believe that the one who shot the deputies could establish any justification for it. He further stated, "Yeah, it would have to be proved to me that he [the defendant] wasn't at fault." The State and the court tried to rehabilitate Mr. Crow but in doing so it became apparent that Mr. Crow was having a difficult time understanding the questions asked by defense counsel, the district attorney and the court. I am of the opinion that defendant had good grounds to challenge this juror for cause.

During the voir dire examination of Floyd N. Nale, this prospective juror stated that the defendant would have to present evidence to show his innocence. Repeatedly, on cross-examination by defense counsel to clear, concise and succinct questions, he responded that the defendant must show something to prove his innocence. The State and the court tried to rehabilitate the potential juror. It is apparent that Mr. Nale was parroting to the State and to the court whatever answer their questions indicated would be acceptable to them. This attempted rehabilitation was ineffective and improper and the challenge for cause of this potential juror should have been allowed.

Bill of Exceptions No. 10 was reserved during the voir dire examination of Alymer Rockett. He first stated, "Well, certainly if the Grand Jury gets an indictment against him charging him with murder, there's always evidence there or they wouldn't have it." To the question of whether or not there was already evidence against the defendant, he replied, "Yes, sir." He further stated that that feeling would always be in his mind. At the same time he stated his opinion that there was evidence already stacked against the defendant and that it would remain in his mind during the deliberations, he also stated he did not think that would make any difference in rendering a decision. Again, like the other jurors, when the State and the court interrogated this potential juror, he tried to give the answers he felt were desired and the court found him to be rehabilitated. However, never did this potential juror, like several of the others previously discussed, tell the court that he could remove from his mind the previously held opinion. He reitered that the opinion would always be there and that the defendant would have to overcome the opinion he carried into the trial and, finally, into the room for deliberations as to guilt or innocence. I am of the opinion the challenge for cause of this juror was good.

A review of these denials of excusing potential jurors for cause merits reversal of the conviction because of the denial of a

fair and impartial jury to the defendant. When these bills are considered in combination with the motion for change of venue, it can then be seen that the trial court did not exercise the proper discretion in acting on the motion for change of venue. In addition to the evidence presented on the motion for change of venue, which would of itself warrant the granting of the motion, these five bills of exceptions taken on voir dire show the jurors' difficulty in effectively, openly, and consistently answering on voir dire examination. C.Cr.P. Art. 622 provides, in part:

"In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons *are such that they will affect the answers of jurors on the voir dire examination* or the testimony of witnesses at the trial." (Emphasis supplied.)

The contradictory answers given by the jurors noted in the previous five bills of exceptions are indicative of the difficulty these potentials jurors had in answering on the voir dire examination. Although the State in one or two instances got apparent withdrawal of prior statements which would have given rise to grounds for challenge for cause upon at least three occasions, no unequivocal change of position was drawn from several of the prospective jurors. Not only is there reversible error in the refusal to grant the challenges for cause, but a perusal of the voir dire examination of the potential jurors convinces me that the defendant could not have obtained a fair and impartial trial in the parish where he was convicted. See my dissent in State v. Johnson, 263 La. 462, 268 So.2d 620 (1972).

Finally, I am of the opinion that the discriminatory exclusion of women from jury duty under authority of Louisiana Constitution Article 7, § 41, and Code of Criminal Procedure Article 402 is violative of the United States Constitution.

For the reasons assigned, I respectfully dissent.

APPENDIX B

Art. 7 § 41 DISTRICT COURTS

§ 41. Selection of jurors; woman jurors; trial by judge; trial by jury

Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Historical Note

Earlier Constitutions:
1913, arts. 116, 100.
1898, arts. 116, 100.

Cross References

Concurrence of jury necessary for conviction, see LSA-R.S. 15:337 et seq.
Impaneling of jury,
Challenges for cause, see LSA-R.S. 15:203, 15:350, 15:352.
Examination of prospective jurors, see LSA-R.S. 15:349.
General and special causes for challenge, see LSA-R.S. 15:350.
Peremptory challenges, see LSA-R.S. 13:3050, 15:354.
Prosecution, causes for challenge by, see LSA-R.S. 15:352.
Jury to be judge of questions of law and facts in criminal cases, see Art. 10, § 9.
Number of jurors required for trial of particular offenses, see LSA-R.S. 15:337 et seq.
Persons exempt from jury service, see LSA-R.S. 13-3042, 15:174.
Qualifications of jurors, see LSA-R.S. 13:3041, 15:172.
Right of accused to speedy public trial by impartial jury, see Art. 1, § 9; LSA-R.S. 15:318.
Selection and drawing of jurors,
Discrimination on account of sex prohibited, see LSA-R.S. 13:3050.
New Orleans Parish, see LSA-R.S. 13:3101, 15:194.
Parishes, except New Orleans, see LSA-R.S. 13:3044, 15:179.
Women, filing of written declaration of consent as prerequisite, see LSA-R.S. 13:3055.
Waiver of trial by jury, see LSA-R.S. 15:342.
Women jurors, eligibility for service, see LSA-R.S. 13:3055.

Law Review Commentaries

Hints on reforms in Louisiana criminal procedure. St. Clair Adams, 2 Loyola L.J. 7 (Nov. 1920).

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I. GENERALLY

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1. Retroactive effect

Provision of Const.1898, art. 116, substituting concurrence of nine of jury for unanimity of jury required prior to its adoption to convict for crime was unconstitutional in so far as applicable to offenses committed prior to its adoption. State v. Ardoin, 1899, 51 La.Ann. 169, 24 So. 802, 72 Am.St.Rep. 454.

Provision of Const.1898, art. 116, for trial of criminal cases not necessarily punishable at hard labor by court without jury was unconstitutional in its application to offenses committed before its adoption. State ex rel. Sherburne v. Baker, 1899, 50 La.Ann. 1247, 24 So. 240, 69 Am.St.Rep. 472.

2. Selection of jurors—Generally

LSA-R.S. 15:201, providing for drawing of tales jurors in criminal district court for parish of Orleans from regular and special panels of different sections of such court is not unconstitutional as local or special law regulating practice or jurisdiction of courts. State v. O'Day, 1937, 188 La. 169, 175 So. 838.

Every court has the power necessary to the exercise of the jurisdiction conferred upon it, and, in the absence of specific provisions of law upon the subject, may adopt such means as may be necessary for the correction of irregularities in the drawing of juries and such like matters. State v. Kellogg, 1901, 104 La. 580, 29 So. 285.

3. —— Negroes

The necessary selection of some persons for jury service and the exclusion of others solely because of competency

or incompetency of the persons selected or excluded in the judgment of the jury commissioners is not a distinction or discrimination on account of race, color, previous condition, or national conditions. State v. Guirlando, 1922, 152 La. 570, 93 So. 706.

The fact that all the names drawn from the jury wheel were those of white persons did not show a discrimination against a colored defendant, in the absence of proof that all the names in the wheel were of white people. State v. Murray, 1895, 47 La.Ann. 1424, 17 So. 832, affirmed 16 S.Ct. 900, 163 U.S. 101, 41 L.Ed. 87.

4. —— Women

Under this section and provisions of Acts 1924, No. 10, § 2 (LSA-R.S. 13:3050), for service of women on juries when they are registered for that purpose, indictment was not subject to dismissal because no women were summoned or served on grand jury, in absence of design or attempt to exclude the women who had qualified by registering. U. S. v. Coen, D.C.1947, 72 F.Supp. 10.

Under this section providing that no woman shall be drawn for "jury service" unless she shall have previously filed with clerk of district court a written declaration of her desire to be subject to such service, the quoted words mean service on both kinds of juries, petty and grand. U. S. v. Haynes, D.C.1947, 69 F.Supp. 424.

Where this section and LSA-R.S. 15:172, 15:174, provided that no woman shall be drawn for jury service unless she shall have previously filed with clerk of district court a written declaration of her desire to be subject to such service and only nine women out of gross population of 250,000 had offered to serve on grand jury of division at time jury was drawn that found indictment against accused, and there was no systematic or intentional omission of women from venire box because of sex, the grand jury was not illegally constituted because of absence of women and indictment would not be dismissed. Id.

Provision of this section and acts 1898, No. 135, § 1 (LSA-R.S. 13:3041; 15:172), that no woman shall be drawn for jury service unless she has filed written declaration of desire was not invalid. State v. Dreher, 1928, 166 La. 924, 118 So. 85, certiorari denied 49 S.Ct. 30, 278 U.S. 641, 73 L.Ed. 556.

In absence of proof that any woman had filed application for jury duty, under this section, the fact that no names of women were placed in jury box did not sustain charge of discrimination; it being presumed that jury commission did its duty. State v. Davis, 1923, 154 La. 295, 97 So. 449.

This section providing that no woman shall be drawn for jury service unless she shall have previously filed a declaration of her desire to be subject to such service, does not violate U.S.C.A.Const. Amend. 19, which applies only to the right to vote, and has no effect on any previous law on the subject of jury service. State v. Bray, 1923, 153 La. 103, 95 So. 417.

In so far as Acts 1921, No. 34 (LSA-R.S. 9:51), conferring on women the same rights, authority, privileges, and the immunities, and subjecting them to the same obligations and duties, as men in the holding of office, applies to eligibility or liability for jury service, the discrimination made in this section providing that women shall not be drawn for jury service unless they file a written declaration of their desire to be subject to such service, must prevail. Id.

Women may not be drawn for jury service unless they have previously filed with the clerk of the district court a written declaration of their desire to be subject to such service. Op.Atty.Gen. 1936-38, p. 415.

5. Qualifications and competency of jurors

It is not necessary to the competency of a juror that he should be a scholar, and understand the definition of any word used in the course of a trial by witnesses, counsel, and the court; but it is sufficient if he is conversant with the English language so as to understand in substance the argument of counsel, and the testimony of witnesses. State v. Ford, 1890, 42 La.Ann. 253, 7 So. 696; State v. Casey, 1892, 44 La.Ann. 969, 11 So. 583.

Jurors are not incompetent because of their lack of knowledge of law and questions in respect thereto should not be asked on voir dire. State v. Dreher,

1928, 166 La. 924, 118 So. 85, certiorari denied 49 S.Ct. 36, 278 U.S. 641, 73 L.Ed. 556.

A juror's statement in response to a direct question that he would hurry the case up in reaching a verdict so as to get back to his work did not show that he was incompetent, as jurors are in a sense officers of the court and presumed to give the requisite time and attention to the cases submitted to them, especially where he was reprimanded by the court, and withdrew his answer, saying that he did not mean it in the sense in which it was understood. State v. Hopkins, 1923, 152 La. 1060, 95 So. 221.

One is not disqualified as a juror by waiting as a deputy sheriff on the grand jury which found the indictment; the proceedings of that body being secret. State v. Foster, 1922, 150 La. 971, 91 So. 411.

In murder prosecution, juror who was not connected with the sheriff's office, but merely served such papers as the sheriff sent him by mail, and who was not related to deceased or his family or to the chief deputy sheriff, was not disqualified merely because the chief deputy sheriff was a relative of deceased's wife. State v. Morgan, 1920, 147 La. 205, 84 So. 580, certiorari denied 40 S.Ct. 588, 253 U.S. 498, 64 L.Ed. 1032.

A summary order barring persons from serving as jurors, because they returned a verdict of acquittal where it is thought by the public that there should have been a conviction, is void; no law authorizing it, and the infliction of punishment not being permissible, unless denounced by the Legislature, and preceded by trial. Teat v. Land, 1914, 135 La. 782, 66 So. 199, L.R.A.1915A, 563, Ann. Cas.1916C, 1208.

A citizen who has resided more than one year in the parish in which the court is held is a competent juror, under Acts 1898, No. 135 (LSA-R.S. 13:3041 et seq.), passed to carry into effect Const.1898, arts. 116, 117, and need not be an elector, nor a resident for two years. State v. Willie, 1912, 130 La. 454, 58 So. 147.

Where none of certain jurors objected to in a murder case were connected by marriage nor related by blood to either decedent or accused, and none had any bias for nor prejudice against either, and none knew of the matters involved in the case other than by rumor and hearsay, and all testified that if selected as jurors their minds were in such a condition that they could render a fair and impartial verdict according to the law and evidence, laying aside any preconceived opinion and disregarding what they had heard before, and that they knew of no reason which would preclude them from rendering such a verdict, they were competent. State v. Owen, 1910, 126 La. 646, 52 So. 860.

On an indictment for murder, where a juror of foreign birth testifies that he knows enough English to enable him to understand what the lawyers and witnesses may say, he is not disqualified by the fact that he does not know the meaning of the terms "bias," "prejudice," and "verdict." State v. Dent, 1890, 41 La.Ann. 1082, 7 So. 694.

Under Const.1879, art. 116, and Acts 1868, No. 54, requiring jurors to be intelligent persons, it is not an improper or illegal discretion on the part of the jury commissioners, under certain conditions, to determine the questions of intelligence of a juror by his ability to read and write, not as a conclusive test, but as one of the means of determining his competency. State v. Chase, 1885, 37 La.Ann. 165.

A juror who does not understand the language in which the proceedings are conducted is as much an unfit person to sit on the trial as though he were infirm, or incapable of rendering such services. State v. Push, 1871, 23 La. Ann. 14.

A juror is not incompetent because he is a witness in the case. Rondeau v. New Orleans Improvement & Banking Co., 1840, 15 La. 160.

A juror is competent, though ignorant of the English language. Gay v. Ardry, 1840, 14 La. 288.

6. Examination of jurors

The voir dire examination of jurors cannot be limited by trial judge so as to destroy or impair the rights of challenge for cause and peremptory challenge granted by Art. 1, § 10. State v. Henry, 1941, 196 La. 217, 198 So. 910.

Parties have a right to question jurors on their examination, not only for purpose of showing grounds for a challenge

for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge, and it is error for trial court to exclude questions which are pertinent for either purpose. Id.

7. Challenge of jurors

LSA-R.S. 15:354, granting state right to challenge jurors peremptorily was constitutional. State v. Sharp, 1932, 174 La. 860, 141 So. 859.

A juror is subject to challenge for cause where his answers on his voir dire to questions propounded by the judge, differing from those first given showing him utterly incompetent, were given after the judge had threatened him with contempt proceedings because of his original answers. State v. Fourchy, 1899, 51 La.Ann. 228, 25 So. 109.

8. Withdrawal of juror

Accused was charged with wounding, in violation of Rev.St. § 791, and the court, being of the impression that it was triable by a jury of 12, proceeded to impanel a jury of that number, when it was discovered that the proper jury was five, whereupon the court ordered the six to stand aside, to which defendant filed a bill of exceptions, reciting that defendant objected to the withdrawal of the jurors and to the action of the court in ordering them to stand aside, which objection was properly overruled, since such exception did not cover an objection that the court should not have dismissed the six, but should have dismissed the entire jury and begun anew the impanelment of a jury of five. State v. Hussey, 1911, 127 La. 1083, 54 So. 358.

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31. Construction and application

The obvious purpose of Const.1898, art. 116, providing that all cases in which the punishment may not be at hard labor shall be tried by the judge without a jury, that cases in which the punishment may be at hard labor shall be tried by a jury of five all of whom must concur to render a verdict, that cases in which the punishment is necessarily at hard labor must be tried by a jury of 12, 9 of whom may render a verdict, and cases in which the punishment may be capital must be tried by a jury of 12, all of whom must concur to render a verdict, is to facilitate, expedite, and reduce expense in the administration of criminal justice, and has no such application to criminal prosecutions in which the charge of a higher includes or may have joined with it in the same indictment or information that of a lower offense, as to prevent the tribunal having jurisdiction of the higher offense from convicting of the lower offense so included or joined. State v. Lewis, 1912, 129 La. 800, 56 So. 893.

32. Cases triable without jury

Where prosecution is for theft of property of the value of $30.66, the penalty of imprisonment at hard labor may be imposed, in discretion of the trial judge, but when the prosecution is for theft of property alleged to be worth only $19, the defendant, if convicted, is not subject to imprisonment at hard labor, but is subject only to the penalty of a fine or imprisonment in the parish prison, or both the fine and imprisonment in the parish prison, and a trial by judge without a jury is proper. State v. Green, 1946, 210 La. 190, 26 So.2d 693.

Accused charged with offense punishable by imprisonment with or without hard labor, who at time of trial changed his plea of not guilty and waived trial by jury, was entitled to be tried by court without jury. State v. Shall, 1933, 177 La. 923, 149 So. 523.

Judge has no power to try without jury one charged with offense necessarily punishable at hard labor, and such trial is void. State v. Porter, 1933, 176 La. 673, 146 So. 465.

Accused found guilty "as charged" was convicted of larceny of property valued at $19, not $32.41, as charged in information and which amount district attorney reduced to $19 prior to trial; hence offense was properly tried by judge without jury. State v. Kelly, 1933, 176 La. 405, 146 So. 6.

Court had jurisdiction without jury to try separate indictments for keeping banking house as for first offenses constituting misdemeanors. State v. Carter, 1929, 168 La. 807, 123 So. 332.

Under Acts 1870, No. 12 (LSA-R.S. 14:90), providing a fine for first offense of keeping a banking game, defendant not charged in information as a second offender was triable by judge, without a jury, in view of this section, though punishment for second offense was by both fine and imprisonment. State v. Kilshaw, 1925, 158 La. 203, 103 So. 740.

In a prosecution for operating a banking game in violation of Acts 1870, No. 12 (LSA-R.S. 14:90), it was proper to try defendant before the judge alone, it not being charged that it was a second offense, and he being liable for a first offense to a fine only and not to imprisonment at hard labor, in view of this section. State v. Capell, 1924, 154 La. 662, 98 So. 58.

Where an indictment under Rev.St. of 1870, § 854 (LSA-R.S. 14:60), was for entering a store with intent to commit a crime and stealing a pair of shoes of the value of $7.50, a sentence cannot be imposed upon a verdict of guilty by a jury since under this section, all cases in which the punishment may not be at hard labor must be tried by a judge without a jury, and under Acts 1902, No. 107, a larceny of less than $20 is not punishable by hard labor. State v. Stephens, 1922, 150 La. 944, 91 So. 349, 23 A.L.R. 280.

Under Const.1913, arts. 9, 96, 116, declaring what cases shall be tried without juries, and Acts 1898, No. 103 (LSA-R.S. 13:2441 et seq.), creating city court of city of Shreveport, vested with jurisdiction defined by Const.1913, art. 96, judge thereof has jurisdiction of offenses against state, and is within intendment of Rev.St. of 1870, § 974, providing additional penalties for second offenses, etc. State v. Nejin, 1917, 140 La. 793, 74 So. 103.

In parishes to which the juvenile court law, Const.1913, art. 118, has not been extended, the criminal jurisdiction, as conferred on the district courts by articles 109, 116, remains unaffected so that relator may be tried for wilfully assaulting another by judge sitting without a jury. State v. Melton, 1915, 136 La. 387, 67 So. 174.

The provision of Const.1898, art. 116, that cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury, abrogated the general common-law rule that, where the accusation includes an offense of an inferior degree, the jury may discharge the defendant of a higher crime and convict of the lesser one. State v. Fruge, 1902, 106 La. 604, 31 So. 323.

33. Cases triable by jury—Generally

The number of jurors to try a case is determined by gravity or nature of crime charged and not by verdict returned of a lesser offense. State v. Stanford, 1944, 204 La. 430, 15 So.2d 817; State v. Iseringhausen, 1944, 204 La. 503, 16 So.2d 65.

Under this section, a prosecution for theft of property of a value exceeding $20 but less than $100, being punishable by imprisonment with or without hard labor, is triable by a jury of 5 members unless defendant waives right to trial by jury, whereas prosecution for theft of property of a value less than $20, not being punishable by imprisonment at hard labor but punishable only by fine or imprisonment in parish prison, or by both fine and imprisonment in parish prison, is triable by judge without a jury. State v. Green, 1946, 210 La. 190, 26 So.2d 693.

34. —— Five members

Where larceny at time of commission of offense was punishable by imprisonment with or without hard labor, and at time of trial, under LSA-R.S. 15:67, was punishable by fine or imprisonment with or without hard labor, under provision of this section, that cases in which punishment may be at hard labor shall be

Note 34

tried by a jury of five, defendant was properly tried by a jury of five since new act retained possibility of punishment at hard labor which precluded offense from being classed as a "misdemeanor" to be tried by a judge. State v. Gable, 1943, 202 La. 770, 12 So.2d 809.

In larceny cases where value of property is alleged to be more than $20, offense is triable by jury of five. State v. Kelly, 1933, 176 La. 405, 146 So. 6.

Larceny, being punishable by imprisonment with or without hard labor, is triable by jury of five members. State v. Hill, 1930, 171 La. 277, 130 So. 865.

When defendant, charged with crime triable by jury of five members, is tried by jury of twelve, verdict and sentence are null, though defendant consented. Id.

Defendant, prosecuted for carnal knowledge punishable by imprisonment with or without hard labor, was properly tried by jury of five. State v. Fuller, 1927, 164 La. 718, 114 So. 606.

Prosecution for assault by willfully shooting at, alleged to have been committed in 1898, was improperly tried before a jury of 5, instead of 12, under Const.1898, art. 116, and Rev.St., § 792, as amended by Acts 1906, No. 59, notwithstanding Acts 1912, No. 9. State v. Hayes, 1926, 161 La. 963, 109 So. 778.

Where defendant, charged with a crime for which under this section, he should be tried by a jury of only 5 members, is tried by a jury of 12 the verdict and sentence are null. State v. Bailey, 1923, 154 La. 536, 97 So. 851.

Larceny of an amount exceeding $100 is punishable by imprisonment with or without hard labor at judge's discretion, and is therefore triable under this section, by jury of 5 or by judge at defendant's option. State v. Hataway, 1923, 153 La. 751, 96 So. 553.

Under this section and section 42, prosecution for crime punishable with imprisonment with or without hard labor is triable by jury of 5, or if defendant waives such trial, by the judge alone, and cannot be tried by jury of 12, even with defendant's consent. Id.

Acts 1912, No. 9, under which accused was charged with willfully shooting at another, providing a penalty of not more than 20 years, with or without hard labor, falls within the class of cases contemplated by Const.1913, art. 116, which must be tried by a jury of five, or by the court without a jury, if waived. State v. Woodard, 1919, 144 La. 845, 81 So. 337.

The offense of stealing a hog of the value of $20 is triable, under Const.1913, art. 116, by a jury of five. State v. Hunley, 1916, 139 La. 846, 72 So. 376.

The offense denounced by Rev.St. § 791, being punishable by "imprisonment at hard labor, or otherwise," is required by this section to be tried by a jury of 5, subject to the right of the accused to waive such jury and be tried by the judge, and the jurisdiction to try such offense not being conferred by law on a jury of 12 can no more be vested in it, by the consent or nonaction of the accused, than it can be vested in a jury of 3 or a mob of 50. State v. Beebe, 1914, 127 La. 493, 53 So. 730.

Rev.St. § 791, makes the offense of shooting with intent to kill and murder punishable by "imprisonment at hard labor or otherwise", and under Const. 1898, art. 116, one so charged cannot legally be tried by a jury of 12, but must be tried by a jury of five. State v. Reeves, 1911, 128 La. 37, 54 So. 413.

The offense of wounding, created by Rev.St. § 791, being punishable by imprisonment at hard labor or otherwise, is required by the Constitution to be tried by a jury of five. State v. Hussey, 1911, 127 La. 1083, 54 So. 358.

Under Acts 1898, No. 72 (LSA-R.S. 14:69), amending Rev.St. § 832 (LSA-R.S. 14:69), and prescribing the punishment for receiving stolen goods, knowing the same to be stolen, to be imprisonment, with or without hard labor, not exceeding two years, and Const.1898, art. 116, a case charging such offense may be tried by a jury of five. State v. Duggan, 1901, 104 La. 620, 29 So. 278.

Where a conviction of cutting a person with a dangerous weapon, with intent to murder, was punishable, under Rev.St. § 791, by imprisonment at hard labor "or otherwise," such case was triable by a jury of five under Const.1898, art. 116, providing that cases in which the punishment may not be at hard labor shall be tried by a jury of five. State v. Sinegal, 1899, 51 La.Ann. 932, 25 So. 957.

35. —— Twelve members

LSA-R.S. 15:407, respecting larceny, embezzlement, obtaining by false pretenses, or swindling was not unconstitutional as permitting conviction of person of crime, not necessarily punishable at hard labor, by jury of twelve. State v. Ritchie, 1931, 173 La. 942, 136 So. 11.

Trial by jury of twelve, nine of whom may render verdict, is invalid, if crime is one for which penalty is not necessarily imprisonment at hard labor. State v. Flattmann, 1931, 172 La. 620, 135 So. 3.

Burglary, being necessarily punishable by imprisonment in penitentiary, must be tried by jury of twelve members. State v. Hill, 1930, 171 La. 277, 130 So. 865.

Grand larceny, being "subject to infamous punishment," is "felony" which is triable by jury of five and appealable as of right. State v. Hutchinson, 1927, 163 La. 146, 111 So. 656.

A prosecution for burglary of dwelling house with intent to steal is triable only by jury of 12 under this section, and defendant cannot elect to be tried by judge alone. State v. Hataway, 1923, 153 La. 751, 96 So. 556.

As under Const.1898, art. 116, a capital offense must be tried by a jury of 12, all of whom must concur, if, when polled, a juror answered it was not his verdict, there was no conviction. State v. Nelson, 1912, 130 La. 356, 57 So. 1003.

Under Const.1898, art. 116, embezzlement, a felony punishable at hard labor, is triable by a jury of 12, and a jury of 5, trying an accused for petit larceny, has no jurisdiction to convict him of embezzlement. State v. Evans, 1908, 122 La. 273, 47 So. 603.

36. Indictment for separate offenses—Generally

Where defendant, charged with burglary of railroad car and larceny of goods valued at $30, was convicted of latter offense only by jury of twelve, judgment was properly arrested and new trial ordered. State v. Hill, 1930, 171 La. 277, 130 So. 865.

Under this section, a jury of 12 cannot be given jurisdiction of the charge of larceny by cumulating therewith in separate count of the same indictment a charge of burglary of a dwelling house. State v. Hataway, 1923, 153 La. 751, 96 So. 556.

Since burglary is punishable only by imprisonment with hard labor so as to be triable by a jury of 12, under this section, a charge of larceny in the same count with the charge of burglary is considered only as expressing the intent with which the burglary was committed, and the jury cannot legally convict the defendant of larceny under such indictment. State v. Desselles, 1922, 150 La. 404, 90 So. 773.

In view of the fact that larceny, unaccompanied with burglary or other crime, is punishable by imprisonment either with or without hard labor, under Rev.St. § 812 (LSA-R.S. 14:67), and Acts 1902, No. 107, so as to be triable by a jury of 5, under this section, or by the judge, depending upon the value of the property stolen, while larceny accompanied with burglary is punishable only by imprisonment with hard labor so as to be triable by a jury of 12, an indictment for larceny should allege it was accompanied by burglary or other crime if that was the fact, and the jury cannot convict of the ungraded crime of petit larceny accompanied with burglary, where the indictment did not contain such allegation. Id.

The consent by defendants to consolidation for trial of an indictment charging burglary, which is triable by a jury of 12, with an indictment charging larceny, unaccompanied by burglary, which is triable by a jury of 5, does not give the jury of 12 jurisdiction to try the charge of larceny. Id.

37. —— Single indictment

Separate offenses, both being committed by same party, on same person at same time and place and not necessarily being subject to punishment at hard labor, were unquestionably subject to same mode of trial and nature of punishment so as to warrant the inclusion in one indictment in separate counts without conflicting with this section providing for the trial of cases according to the punishment imposed by law. State v. Bell, 1931, 173 La. 87, 136 So. 97.

LSA-R.S. 15:218, requiring single indictment for two or more crimes resulting from single act or continuous unlaw-

Note 37

ful transaction, construed, in view of LSA-R.S. 15-226 and 15-337, as requiring that such crimes be tried in same trial before same tribunal, most serious offense to determine the composition of tribunal, is contrary to this section, which provides for different tribunals in different classes of offenses. State v. Cormier, 1931, 171 La. 1035, 132 So. 779.

LSA-R.S. 15:218; 15:226; 15:337, requiring single indictment for separate offenses resulting from same transaction was unconstitutional as such sections provide not only that offenses triable by same number of jurors be joined in same indictment and tried together, but that offenses not cognate, and not triable in same manner, should be tried by same jury, when charged in separate counts, the higher offense controlling selection of jurors, thus violating this section. State v. Jacques, 1931, 171 La. 994, 132 So. 657.

Const.1898, art. 116, providing that cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur, and that cases in which the punishment is necessarily at hard labor, by a jury of 12, 9 of whom may render a verdict, has not so changed the law regulating procedure in criminal prosecutions as to prevent the trial, under one indictment, of offenses which might previously have been so tried. State v. Perry, 1900, 116 La. 231, 40 So. 686.

38. Second or subsequent offenders

Acts 1928, No. 15 (LSA-R.S. 15:529.1), providing for increased punishment for second and subsequent offenders was not unconstitutional because not providing that jury shall determine whether accused is second or third offender. State v. Hardy, 1932, 174 La. 453, 141 So. 27.

Under Const.1913, art. 116, and Rev. St. § 974, the judge has no power to sentence accused convicted of the fourth offense to the penitentiary in misdemeanor cases, nor to sentence accused to perpetual imprisonment in jail, except where double and triple penalties have been previously imposed. State v. Kierson, 1916, 140 La. 31, 72 So. 709.

39. Conviction of lesser crime

Acts 1930, No. 64, § 3, providing that, if person charged with causing death by grossly negligent use of vehicle be found not guilty of manslaughter, verdict of involuntary homicide may be rendered by jury, was not unconstitutional. State v. Flattmann, 1931, 172 La. 620, 135 So. 3.

40. Lunacy proceedings

LSA-R.S. 15:268-15:273, making finding of lunacy commission final violates provisions of this section as to jury trial. State v. Lange, 1929, 168 La. 958, 123 So. 630, 67 A.L.R. 1447; State v. Ellis, 1929, 168 La. 967, 123 So. 642.

LSA-R.S. 15:267-15:273, respecting insanity as defense did not violate provisions of this section respecting jury trial and "trial" by judge without jury. State v. Burris, 1930, 169 La. 520, 125 So. 580.

41. Concurrence necessary for verdict

Where murder charge was properly abandoned by state prior to proceeding to trial for manslaughter, instruction that concurrence of only nine jurors was necessary was proper, since manslaughter is not "capital offense". State v. Doucet, 1933, 177 La. 63, 147 So. 500, 87 A.L.R. 1350.

In view of Const.1913, art. 116, providing that processes for crime for which the only penalty that can be imposed is imprisonment and hard labor shall be by jury of 12, 9 of whom must concur, a verdict of guilty by 10 jurors in a bigamy case, the only penalty for which is imprisonment and hard labor, is sufficient. State v. Trull, 1920, 147 La. 444, 85 So. 70.

Where accused was only tried for manslaughter on an indictment charging murder, because of a prior conviction of manslaughter only, the offense was within Const.1913, art. 116, allowing verdict to be found by nine of the jurors. State v. Wooten, 1915, 136 La. 560, 67 So. 366.

Under Const.1898, art. 116, providing that the cases in which the punishment may be capital must be tried by a jury of 12, all of whom must concur to render a verdict, and that cases in which the punishment is at hard labor must be tried by a jury of 12, 9 of whom may render a verdict, on a trial for murder, all of the 12 jurors must concur to find a verdict for manslaughter. State v. Biagas, 1901, 105 La. 503, 29 So. 971.

42. Alternate jurors

Acts 1940, No. 6 (LSA-R.S. 15:362), providing for the selection of one or two alternate jurors to be substituted in case a regular juror dies or becomes ill is not unconstitutional on ground that it violates the provision of this section guaranteeing the accused, in a capital case, the right to be "tried by a jury of 12". State v. Breedlove, 1942, 199 La. 965, 7 So.2d 221; State v. Moreau, 1942, 200 La. 293, 7 So.2d 915.

Where alternate juror sat near jury during murder trial and was with other jurors in custody of sheriff at night, but, after evidence was concluded and it was apparent that alternate juror's services would not be needed, he was excused, defendant could not complain that Acts 1940, No. 6 (LSA-R.S. 15:362), under which alternate juror was chosen was unconstitutional on ground that it violated provision of this section guaranteeing the accused, in a capital case, the right to be "tried by a jury of 12". State v. Breedlove, 1942, 199 La. 965, 7 So.2d 221.

43. Waiver of jury trial

One accused of a crime, not necessarily punishable by hard labor or death, may waive his right to a trial by jury, and elect to be tried by the court, and there is nothing in the constitution that conflicts with such right of waiver. State v. White, 1881, 33 La.Ann. 1218; State v. Askins, 1881, 33 La.Ann. 1253.

One indicted for manslaughter cannot waive trial by jury. State v. Porter, 1933, 176 La. 673, 146 So. 405.

One charged with crime necessarily punishable at hard labor is not bound by his voluntary waiver of jury trial and may take advantage of irregularity in trial by judge alone on motion to arrest judgment. Id.

A prosecution for burglary of dwelling house with intent to steal is triable only by jury of 12 under this section, and defendant cannot waive such trial or elect to be tried by less than 12 jurors or the judge alone. State v. Hataway, 1923, 153 La. 751, 96 So. 536.

A person, indicted for a crime necessarily punishable at hard labor, who pleads not guilty, cannot, even with his own consent, waive trial by jury, and be tried by the judge alone. State v. Jackson, 1901, 106 La. 189, 30 So. 309.

Where accused, indicted for larceny, waived jury trial, and was found guilty by the court, but obtained a new trial, he could demand a jury. State v. Touchet, 1881, 33 La.Ann. 1154.

§ 42. Grand jury; district judges, authority in criminal cases

Section 42. A grand jury of twelve, nine of whom shall constitute a quorum and must concur to find an indictment, shall be empanelled in each parish twice in each year, and shall remain in office until a succeeding grand jury shall have been empanelled, except in the parish of Cameron, in which at least one grand jury shall be empanelled each year.

The district judges shall have authority to try at any time misdemeanors, and, when the jury is waived by the defendant, all cases not capital or necessarily punishable at hard labor, and to receive pleas of guilty in all cases less than capital.

Historical Note

Earlier Constitutions:

1913, art. 117.
1898, art. 117.
1879, arts. 116, 117.

ened in the above article to include persons who are mentally incompetent or possibly of a low intellectual level, but are not interdicted. This same approach is taken in the federal provision 28 U.S.C. § 1861, and the California statute, Cal.Code of Civ. Proc., § 198.

(e) The provision in Art. 172 prohibiting discrimination with respect to prospective jurors on account of race or color is omitted from the above article because it is no longer necessary. Admittedly, there are other bases for unconstitutional systematic exclusion, such as sex, religion, and ancestral nationality. It is preferable to omit a discrimination provision entirely rather than to attempt to include all such cases.

(f) The provision in former Art. 172 directing the judge to disqualify a prospective juror from service in a particular case when doubt existed as to his competency to serve, is included in Art. 787 of this Code.

Art. 402. Service of women as jurors

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Source: Former R.S. 15:172.1; Const. Art. VII, § 41.

Comments

(a) The law concerning jury service by women is not changed by this article. Any substantial change would require a constitutional amendment, because the exemption of a woman from jury service in the absence of a written declaration of desire to serve is embodied in Const. Art. VII, § 41.

(b) In Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), the United States Supreme Court upheld the constitutionality of a Florida statute practically identical to the Louisiana statute. As the opinion points out, eighteen states accord women an absolute exemption based solely on their sex, and three, including Louisiana, use an automatic exemption procedure. The Hoyt decision affirms the right of a state to establish an absolute exemption from jury service, as long as it is based upon some reasonable classification.

Art. 403. Exemption from jury service

The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their

APPENDIX C

Table 35. Age by Race and Sex, for Parishes: 1970—Continued